

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: March 27, 2013

**UNITED STATES PATENT AND TRADEMARK OFFICE**

\_\_\_\_\_  
**Trademark Trial and Appeal Board**  
\_\_\_\_\_

In re Nordic Naturals, Inc.  
\_\_\_\_\_

Serial No. 77131419  
\_\_\_\_\_

Meredith M. Wilkes of Jones Day for Nordic Naturals, Inc.

Nelson B. Snyder III, Trademark Examining Attorney, Law  
Office 107 (J. Leslie Bishop, Managing Attorney).

\_\_\_\_\_  
Before Kuhlke, Cataldo, and Shaw, Administrative Trademark  
Judges.

Opinion by Shaw, Administrative Trademark Judge:

Applicant, Nordic Naturals, Inc., filed an application  
to register on the Principal Register the mark  
CHILDREN'S DHA in standard characters for "Nutritional  
supplements containing DHA"<sup>1</sup> in International Class 5.<sup>2</sup>  
Applicant disclaimed DHA apart from the mark as shown.

\_\_\_\_\_  
<sup>1</sup> DHA is the abbreviation for docosahexaenoic acid, an omega-3 fatty acid essential for the growth and functional development of the brain, Office action dated June 25, 2007.

<sup>2</sup> Application Serial No. 77131419 was filed March 14, 2007, based upon applicant's assertion of July 1, 2000 as a date of first use anywhere and in commerce.

Registration has been refused on the grounds that the mark is deceptive of a feature or ingredient of the identified goods under Section 2(a) of the trademark Act and generic under Section 2(e)(1). 15 U.S.C. §§ 1052(a) and 1052(e)(1). In the event the mark is not generic, registration also has been refused on the ground that the mark is merely descriptive and applicant has not demonstrated that it has acquired distinctiveness under Section 2(f). 15 U.S.C. § 1052(f). In addition, the examining attorney made final his requirement that applicant amend its identification of goods to indicate that the goods are formulated for children.

When the refusals were made final, applicant filed an appeal and two requests for reconsideration. Both requests for reconsideration were denied and the appeal was resumed. Applicant and the examining attorney each filed briefs, and applicant filed a reply brief.

***Evidentiary Issue***

Before turning to the merits of the appeal, we first address an evidentiary matter. Applicant submitted for the first time with its appeal brief evidence identified as Exhibit A, consisting of copies of eight third-party registrations for marks including the term "kids" without a disclaimer. The examining attorney, in his brief, objected

to the untimely submission of this evidence. Trademark Rule 2.142(d) provides that the record in an application should be complete prior to the filing of an appeal. The Board will ordinarily not consider additional evidence filed after the appeal is filed. See TBMP § 1207.01 (3d ed. rev. 2012) and cases cited therein. Accordingly, the examining attorney's objection is sustained, and we have not considered applicant's untimely evidence in reaching our decision.

***Whether CHILDREN'S DHA is Deceptive***

The U.S. Patent and Trademark Office has the initial burden of putting forth a prima facie case that a trademark falls within the prohibition of Section 2(a). *In re Budge*, 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988) (holding LOVEE LAMB deceptive for "automotive seat covers"). The Court of Appeals for the Federal Circuit has articulated the following test for whether a mark consists of or comprises deceptive matter:

1. Is the term misdescriptive of the character, quality, function, composition or use of the goods and/or services?
2. If so, are prospective purchasers likely to believe that the description actually describes the goods and/or services?

3. If so, is the misdescription likely to affect a significant portion of the relevant consumers' decision to purchase?

*Id.*

The examining attorney argues that the applicant's mark, CHILDREN'S DHA, "misdescribes Applicant's goods if they are not formulated for children."<sup>3</sup> Applicant, however, states that the goods are "designed for use by children".<sup>4</sup>

In light of the fact that the goods contain DHA and are formulated for children, the mark CHILDREN'S DHA simply cannot misdescribe a "character, quality, function, composition or use of the goods." Thus, the first prong of the deceptiveness test is not met and the refusal to register the mark under Section 2(a) must be reversed.

Recognizing that the mark may not misdescribe the goods, the examining attorney alternatively required the applicant to amend the identification of goods to indicate that goods are in fact formulated for children.<sup>5</sup> The examining attorney argues that the formulation of the goods for children is material to the consumer, and therefore, the identification of goods must be amended to remove any

---

<sup>3</sup> Examining Attorney's Br. at 8. The examining attorney notes that applicant has amended its identification of goods to indicate that the goods contain DHA and thus he focuses on the misdescriptiveness of the term CHILDREN'S.

<sup>4</sup> Applicant's Request for Reconsideration, August 23, 2011, p.2.

<sup>5</sup> Examining attorney's Br. at 10.

ambiguity between the mark and the goods as required by TMEP section 1203.02(e)(ii). We agree.

Use of the term CHILDREN'S in the mark informs the prospective consumer that the goods are formulated for children. Used in this way, the term CHILDREN'S makes the product more appealing or desirable and would materially affect the decision to purchase applicant's products over similar nutritional supplements which might not be formulated specifically for children thereby requiring consumers to calculate the appropriate dosage themselves. If the term "children's" is material to consumers, amendment of the identification is necessary. See *In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1698-99 (TTAB 1992) (materiality to the decision to purchase includes connotations which increase appeal or desirability to prospective consumers). Accordingly, the requirement that applicant amend its identification of goods to indicate that they are formulated for children is affirmed.

***Whether CHILDREN'S DHA is Generic***

When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by "clear evidence" thereof. See *In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d

**Ser. No. 77131419**

1110, 1111 (Fed. Cir. 1987); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

The critical issue is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods in question. *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); *In re Women's Publishing Co. Inc.*, 23 USPQ2d 1876, 1877 (TTAB 1992).

Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?" *Marvin Ginn*, 228 USPQ at 530.

Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *See Merrill Lynch*, 4 USPQ2d at 1143; *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We begin by finding that the genus of the goods at issue in this case is adequately defined by the description

of goods: "Nutritional supplements containing DHA."<sup>6</sup> *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) ("[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration."). Applicant agrees with this inasmuch as it argues that the goods "are commonly known and referred to as they have been listed in the identification of goods, i.e., 'nutritional supplements containing DHA.'"<sup>7</sup>

The examining attorney argues that the genus should be defined more narrowly as "nutritional supplements for children that contain DHA."<sup>8</sup> This is an unnecessarily narrow genus. It is well settled that a mark may be refused registration if it is generic for any of the goods encompassed within the genus. *In re Reed Elsevier Properties, Inc.*, 77 USPQ2d 1649, 1654 (TTAB 2005) ("[T]he question of registrability must be determined by considering any goods or services falling within the literal scope of an identification."); *See In re Wm. B. Coleman Co.*, 93 USPQ2d 2019 (TTAB 2010) (holding the genus "lighting fixtures" to encompass electric candles). Thus, the fact that applicant has identified its goods broadly as

---

<sup>6</sup> We analyze this refusal based on the identification without the addition of "children's."

<sup>7</sup> Applicant's Br. at 8

<sup>8</sup> Examining attorney's Br. at 14.

"nutritional supplements containing DHA" will not permit registration if CHILDREN'S DHA is generic for any goods encompassed by this broad terminology, including more-narrowly defined goods such as nutritional supplements containing DHA for children. *See In re Allen Electric and Equipment Co.*, 458 F.2d 1404, 173 USPQ 689, 690 (CCPA 1972) (holding SCANNER merely descriptive of goods broadly identified as "antennas" which encompassed narrower term, "scanning antennas").

Next, we must determine whether the primary significance of CHILDREN'S DHA is understood by the relevant public primarily to refer to that genus of goods. *Marvin Ginn*, 228 USPQ at 530. The "relevant public" for goods sold in the marketplace is limited to actual or potential purchasers of the goods. *Magic Wand*, 19 USPQ2d at 1552-53.

Neither the examining attorney nor applicant has defined the relevant public. Based on the extensive evidence made of record, the identification of goods, and the fact that children are unlikely to buy their own supplements, we find that the relevant public consists of parents or other adults seeking nutritional supplements containing DHA for children.

We now to turn to the second inquiry, the public's understanding of the term CHILDREN'S DHA when used in connection with "nutritional supplements containing DHA."

As noted above, the evidentiary burden of establishing that a term is generic rests with the USPTO and the showing must be based on clear evidence. *Merrill Lynch*, 4 USPQ at 1143. Based on the record discussed below, we find that there is clear evidence to support a finding that the relevant public, when it considers CHILDREN'S DHA in connection with nutritional supplements containing DHA, readily understands the mark to identify nutritional supplements containing DHA formulated for children.

The examining attorney first submitted dictionary definitions of "Children" and "DHA" from the MSN Encarta dictionary:<sup>9</sup>

**Child** (*plural children*) noun

**Definition: 1. young human being:** a young human being between birth and puberty.

**DHA** noun

**Definition: essential fatty acid:** a polyunsaturated essential fatty acid found in cold-water fish and some algae that has been linked to the reduction of cardiovascular disease and other health benefits.  
*Full form* docosahexaenoic acid.

Based on the dictionary definitions which establish that "children's" is the possessive plural meaning of "young human beings" and "DHA " is an "essential fatty

---

<sup>9</sup> Office action of June 25, 2007.

acid" with health benefits, which is present in the applicant's supplements, CHILDREN'S DHA merely refers to an essential fatty acid for children. *Gould*, 5 USPQ2d at 1112 (dictionary definitions support genericness refusal); *In re Wm B. Coleman*, 93 USPQ2d at 2025 (space between generic terms does not disqualify proposed mark from *Gould* analysis).

The examining attorney also included printouts from a number of third-party websites showing use of the term CHILDREN'S DHA in connection with nutritional supplements for children. Below are sixteen representative samples, including some images:

- [www.chiropractic-sports.com](http://www.chiropractic-sports.com) - A web site for a chiropractic sports institute offering nutritional supplements including a product identified as Nutri-West brand "**Complete Children's DHA/EPA**"<sup>10</sup> supplement;<sup>11</sup>

---

<sup>10</sup> EPA is the abbreviation for eicosapentaenoic acid, another fatty acid, Office action dated June 25, 2007.

<sup>11</sup> Office action dated June 25, 2007.

- [www.vitaminshoppe.com](http://www.vitaminshoppe.com) - A web site offering bottles of Vitamin Shoppe brand "**Children's DHA**" in 250 mg capsules. The term **Children's DHA** appears on the bottle label as well as in the text identifying the goods;<sup>12</sup>



- <http://shop.deliciousorganics.com> - A web site offering bottles of Animal Parade brand "DHA for Kids" and stating "No other **children's DHA** supplement can match the ease and convenience of Animal Parade DHA";<sup>13</sup>
- <http://shopping.aol.com> - A web site offering bottles of Spectrum brand "**Children's DHA** chewable softgels. The term **Children's DHA** appears on the bottle label as well as in the text identifying the goods";<sup>14</sup>

### Children's DHA Chewable Softgels, 90 Softgels, SPECTRUM...

[← Back to Results](#)

Price Range : \$11.20 - \$11.20 from 1 Sellers  
Rating: ...

**Children's DHA** Chewable Softgels FINALLY! A NON-FISH DHA SOLUTION FOR KIDS Bursting with Strawberry Banana flavor these delicious chewable softgels will give your kids healthy doses of Omega-3 ALA and DHA. Naturally found in the brain and eyes, clinical research shows that DHA supports a child's brain and vision development. One serving of this unique non-fish DHA formula provides 125mg of this vital nutrient, while avoiding any risk of ocean contaminants. INGREDIENTS: Organic flaxseed oil, DHA algal oil (contains soy lecithin), natural flavor, vitamin E mixed tocopherols and rosemary extract (to protect freshness). Softge... [more](#)

Take a Closer Look

- [www.suzannes.com](http://www.suzannes.com) - A web site offering bottles of Carlson for Kids brand Chewable DHA which is further described as a "**Children's Chewable DHA**";<sup>15</sup>
- [www.nextag.com](http://www.nextag.com) - A web site offering bottles of Go Fish brand "**Children's Omega-3 DHA**" softgels";<sup>16</sup>
- [www.pandagen.com](http://www.pandagen.com) - A web site offering bottles of NuHealth brand "**Children's Hyper DHA/EPA**";<sup>17</sup>

<sup>12</sup> *Id.*

<sup>13</sup> Office action dated April 18, 2008.

<sup>14</sup> *Id.*

<sup>15</sup> Office action dated November 18, 2008.

<sup>16</sup> *Id.*

- [www.drugstore.com](http://www.drugstore.com) - A web site offering bottles of "Kid Wise brand **Children's DHA+** Gummies" and stating "Kid Wise™ **Children's DHA+** is a great way for kids to get the healthy DHA they need in delicious fun to eat gummies." The term **Children's DHA+** appears on the box;<sup>18</sup>

**Knox Kid Wise Children's Plus DHA Gummies,  
- 60 ct 3 fruit flavors**<sup>60 ea</sup>



everyday free shipping

auto delivery eligible

visit: [Knox Store](#)

share: Kaboodle SHARE

- <http://shopping.msn.com> - A web site offering a product called "NSI Omega Fishies for Kids" which is described as a "Chewable **children's DHA supplement**";<sup>19</sup>
- [www.oceanhealth.com](http://www.oceanhealth.com) - A web site offering supplements identified as "Ocean Health's **Children's DHA.EPA**";<sup>20</sup>
- [www.luckyvitamin.com](http://www.luckyvitamin.com) - A web site offering bottles of "Dr. Sears Family Approved - Go Fish Brainy Kidz **Children's Omega-3 DHA**";<sup>21</sup>
- [www.amazon.com](http://www.amazon.com) - A web site offering Nature's Way brand "DHA 4Kids" powder described as a "**Children's DHA Powder**" with a "fruit punch flavor";<sup>22</sup>



**Children's DHA Powder** Fruit Punch Sugar Free 3 Oz.

Other products by [Nature's Way](#)  
No customer reviews yet. [Be the first.](#)

Price: ~~\$27.99~~

Sale: **\$14.95**

You Save: **\$13.04 (47%)**

[Special Offers Available](#)

**In stock.**

Processing takes an additional 2 to 3 days for orders from this seller.  
Ships from and sold by [Herbal Remedies](#).

- [www.wisegeek.com](http://www.wisegeek.com) - A general information web site discussing "Children's DHA" and stating:

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Office action dated June 11, 2009.

<sup>20</sup> Office action dated July 26, 2010.

<sup>21</sup> Office action dated November 18, 2008.

<sup>22</sup> Office action dated November 18, 2008.

**Children's DHA** is a dietary supplement available specifically for children. . . . There are a number of DHA and omega-3 supplements available of [sic] the market today, including **children's DHA** and DHA for pregnant women. . . . **Children's DHA supplements** can come in many forms, such as chewable tablets, gummies, or liquids. . . . When looking for a **children's DHA supplement**, experts agree that quality and safety are the most important factors. Because there are so many brands available, choosing the right one can seem like a daunting task to some, and researching each brand is important. Some scientists believe that the best **children's DHA supplements** are derived from flaxseed oil, or wild freshwater fish. These typically contain less contaminants [sic] than other brands;<sup>23</sup>

- [www.seniorfitness.com](http://www.seniorfitness.com) - A web site with an article titled "**Children's DHA**, Supplements and Brain development" discussing the need for DHA for proper growth and development in children;<sup>24</sup>
- [www.arfworldcongress.com](http://www.arfworldcongress.com) - A web site promoting nutrition and vitamins. It states: "Another children's vitamin product offered by Shaklee is Mighty Smart, a **children's DHA supplement**";<sup>25</sup> and
- An excerpt from a *Prescription Alternatives*, a book about prescription drugs by Earl Mindell available on Google Books which states: "Supplementing diets of kids with ADHD with fish oil high in DHA may help even them out and foster better concentration and impulse control. **Chewable children's DHA supplements are widely available.**"<sup>26</sup>

The foregoing examples of competitors' use of the term "children's DHA" in the name of their products or used to describe their products is persuasive evidence that the

---

<sup>23</sup> Office action dated February 28, 2011.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Office action dated June 11, 2009.

relevant consumers perceive the term as generic (e.g., Nutri-West Complete Children's DHA/EPA, Vitamin Shoppe Children's DHA, Kid Wise™ Children's DHA+, and Spectrum Children's DHA) and that competitors need to use the term. *Continental Airlines V. United Airlines Inc.*, 53 USPQ2d 1385, 1395 (TTAB 1999). Furthermore, the articles and book excerpts about nutrition identify DHA as an important nutritional supplement for children and demonstrate that those writing about nutrition recognize CHILDREN'S DHA as the generic name of DHA supplements formulated for children.

The examining attorney also has included a number of web sites selling applicant's products and which use the term CHILDREN'S DHA to refer to or name the goods. That is, applicant's own online vendors use the term CHILDREN'S DHA as a generic term to refer to applicant's supplements. For example:

- [www.vitaminexpress.com](http://www.vitaminexpress.com) - A web site offering applicant's Nordic Naturals Children's DHA supplement and identifying the goods as follows: "Nordic Naturals CHILDREN'S DHA is a small, chewable **children's DHA supplement** flavored with strawberry essence."<sup>27</sup> A printout of the web page appears below.

---

<sup>27</sup> Office action of February 28, 2011.

The screenshot shows the VitaminExpress website. At the top, there is a logo for VitaminExpress with the tagline "a trustworthy name since 1982" and a phone number 1-800-500-0733. Below the logo is a navigation menu with options: Home, Specials, Favorites, Reports, Health Info, and Help. A secondary menu lists various product categories: Health Solutions, Multiples, Vitamins, Minerals, Herbs, Homeopathy, Personal Care, Sports, and Specialties. The main content area features a search bar with a dropdown menu for "Select a Brand", a "Search Products..." field, and a "Search Information..." field. To the right of the search bar is a product listing for "Nordic Naturals Children's DHA". The product listing includes a small image of the product, a description of its contents (90 Softgels), a suggested retail price of \$14.95, and the current price of \$13.45. It also indicates that there are 2 items in stock. Below the price is an "Add to Cart" button. To the right of the product listing are social media sharing options for Facebook and Twitter. Below the product listing is a section for "Product Info" which contains a detailed description of the product, its ingredients, and the amount of DHA and Vitamin A per serving. The description states that the product is a small, chewable children's DHA supplement flavored with strawberry essence. The ingredients list includes purified arctic cod liver oil, soft gel (gelatin, water, glycerin, strawberry essence), d-alpha tocopherol, strawberry essence, and rosemary extract. The serving size is 4 soft gels, providing 125 mg of DHA and 130-300 IU of Vitamin A. To the left of the product listing is a "Specials" section featuring a product called "Alacer Emergen-C Lite w/MSM".

- www.nextag.com - A web site offering several of applicant's nutritional supplements for children and describing one of them as "Ultimate Omega Children's DHA Formula is a small, natural strawberry flavored chewable **children's DHA supplement.**"<sup>28</sup>
- www.brainchildnutritionals.com - A web site offering applicant's DHA JUNIOR supplement and describing it as follows: "Nordic Naturals DHA Junior is a small, strawberry flavored chewable **children's DHA supplement.**"<sup>29</sup>

The commercial impression conveyed by these web sites is that Nordic Naturals is the brand of nutritional supplements and CHILDREN'S DHA merely identifies the type of supplement, i.e., DHA formulated for children. This use by applicant's vendors is consistent with the other web sites that show that the terms "DHA" and "DHA supplements"

<sup>28</sup> Office action of November 18, 2008.

<sup>29</sup> *Id.*

are used interchangeably to refer to supplements containing DHA.

Applicant counters that this use of "children's DHA supplement" to describe its own products proves nothing because its mark is CHILDREN'S DHA, not "CHILDREN'S DHA SUPPLEMENT." That is, applicant argues, the term "children's DHA supplement" in these advertisements "is being used in its primary, descriptive sense, and not as a source identifier," and therefore, it creates a different commercial impression from applicant's mark, CHILDREN'S DHA.<sup>30</sup>

This argument is unavailing. The fact that the term "supplement" is not present in applicant's asserted mark is not sufficient to avoid a genericness refusal. The web pages made of record show that the terms "DHA" or "DHA supplement" are used interchangeably to refer to supplements containing DHA. Applicant's use of the term "supplement" after "children's DHA" in the advertisement describing its products does not make CHILDREN'S DHA any less generic inasmuch as the record shows numerous examples of "children's DHA," without the term "supplement," being used to refer to supplements containing DHA. See, *In re Abcor Development Corp., Inc.* 588 F.2d 811, 200 USPQ 215,

---

<sup>30</sup> Applicant's Br. at 9.

219 (CCPA 1978) (Rich, J., concurring) (GASBADGE described as a shortening of the name "gas monitoring badge").

This conclusion is supported by three third-party registrations submitted by the examining attorney which demonstrate that the term "DHA" is used by itself as shorthand for nutritional supplements:

- Registration No. 3091572, for the mark **BRAINIUMS DHA** for "nutritional supplements." DHA disclaimed;<sup>31</sup>
- Registration No. 3448865, for the mark **MAX DHA** for, *inter alia*, "nutritional supplements." DHA disclaimed;<sup>32</sup> and
- Registration No. 3171458, for the mark **FRESH CATCH KID'S DHA** for "nutritional supplements." KID'S DHA disclaimed.<sup>33</sup>

Applicant nevertheless argues that the examining attorney's evidence is insufficient to prove that the mark is generic and points to its own evidence to show that the mark is not generic. Applicant has submitted excerpts from "trade journals," an affidavit from its CEO, affidavits from industry professionals, and other materials, all purporting to "establish[] that the relevant public understands CHILDREN'S DHA to refer not to a general class of goods, but to Applicant's specific goods."<sup>34</sup> We find this evidence unpersuasive.

---

<sup>31</sup> Office action dated June 25, 2007.

<sup>32</sup> *Id.*

<sup>33</sup> Office action dated November 18, 2008.

<sup>34</sup> Applicant's Br. at 10.

First, in many of the trade journals and advertisements, applicant's goods are referred to as "Nordic Naturals Children's DHA." While applicant's packaging and promotional efforts effectively reinforce the house mark NORDIC NATURALS as the source of the goods, it does not on its face create a separate trademark awareness, or commercial impression, for CHILDREN'S DHA. The following excerpts from articles submitted by applicant show how the use of the house mark, Nordic Naturals, diminishes the probity of these articles:

- [www.blogsofhope](http://www.blogsofhope) - "Use **Nordic Naturals Children's DHA** for a Healthy Life! With its ability to enhance learning and achievement **Nordic Naturals Children's DHA** is great for both kids and adults!"<sup>35</sup>
- Vitamin Retailer.com - An article awarding prizes to various vitamins and supplements including: Children's Health . . . Second Place (Silver Medal) **Nordic Naturals-Children's DHA**.<sup>36</sup>
- Taste for Life Magazine - "DELICIOUS FOR THE WHOLE FAMILY . . . Both kids and adults love the delicious strawberry flavor of **Nordic Naturals Children's DHA** liquid. . . ." <sup>37</sup>
- Whole Foods - What's Selling: Children's Products . . . **Nordic Natural's - Children's DHA**.<sup>38</sup>

It simply isn't clear from these excerpts that the authors of these articles recognize "children's DHA" as a source

---

<sup>35</sup> Applicant's Response to Office Action dated, May 18, 2009.

<sup>36</sup> *Id.*

<sup>37</sup> Applicant's Response to Office Action dated, May 20, 2009.

<sup>38</sup> *Id.*

indicator for the goods apart from the house mark, Nordic Naturals.

More importantly, much of the evidence purporting to rebut the examining attorney's evidence of genericness relies primarily on the claim that applicant was one of the first manufacturers to offer DHA supplements formulated for children. The fact that an applicant may be the first and only user of a merely descriptive or generic designation does not justify registration if the only significance conveyed by the term is merely descriptive. See *In re Greenliant Systems Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010); *In re Nat'l Shooting Sports Found., Inc.*, 219 USPQ 1018 (TTAB 1983) (SHOOTING, HUNTING, OUTDOOR TRADE SHOW AND CONFERENCE held apt descriptive name for conducting and arranging trade shows in the hunting, shooting, and outdoor sports products field).

For example, the declaration from applicant's CEO, Joar Opheim, explains that applicant has been promoting its CHILDREN'S DHA products since 2000 via advertising, live demonstrations, and distribution of free samples.<sup>39</sup> But nothing in the declaration rebuts the examining attorney's showing that the consuming public sees numerous competitors and media sources also using CHILDREN'S DHA to refer to

---

<sup>39</sup> Applicant Response to Office Action, dated May 18, 2009.

omega-3 supplements for children from sources other than applicant.

The form affidavits submitted on May 18, 2009 from industry employees are similarly unpersuasive.<sup>40</sup> The affidavits are from employees of retail stores selling applicant's supplements. Each affidavit includes the following relevant language:

\*\*\*

3. I am familiar with an omega-3 fatty acid supplement called "Children's DHA" made by Nordic Naturals, Inc. The "Children's DHA" product made by Nordic Naturals, Inc. was the first omega-3 fatty acid supplement made for children. For many years, it was the only one.

4. I associate the brand "Children's DHA" with omega-3 fatty acids originating exclusively from Nordic Naturals, Inc.

5. Based on my experience with customers for dietary supplements, customers associate the "Children's DHA" brand with a product containing omega-3 fatty acids from Nordic fish oil of the highest quality originating exclusively from Nordic Naturals, Inc.

6. Recently, other manufacturers have introduced omega-3 fatty acid supplements, including some formulated for children. In my opinion, those other omega-3 fatty acid supplements are of lesser quality than the original "Children's DHA" product from Nordic Naturals, Inc.

As an initial matter, many of the form affidavits are missing critical information such as the number of years

---

<sup>40</sup> *Id.*

that the affiant has been working in the industry or the volume of applicant's product they sell each year. In addition, the affiants are not end consumers, the declarations are not in their own words, and many of the affiants work in stores selling only a small number of applicant's product each year, with some stores selling as few as 40 or 50 bottles each year. These defects limit the probative value of the affidavits. See *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1723 (TTAB 2010) (finding sixteen declarations of little persuasive value, as they were nearly identical in wording and only one of the declarants was described as an end consumer).

Setting aside the foregoing defects, we find the affidavits are still unpersuasive because the affiants' association of "Children's DHA" solely with applicant appears to be based more on applicant's status as an early provider of DHA supplements rather than on applicant's success in distinguishing its CHILDREN'S DHA from the goods of third parties. In particular, the affidavits state that "[f]or many years" applicant was the first and only provider of omega-3 fatty acid supplements made for children. The affidavits further state that third parties also are producing DHA supplements formulated for children which compete with applicant's "original 'Children's DHA'

product." The emphasis on the fact that the applicant may have been the first and only provider of DHA supplements for children does not compel the conclusion that CHILDREN'S DHA cannot now be generic. Rather, the affidavits suggest that applicant is the "original" of several makers of children's DHA supplements, and nothing more. Simply put, these affidavits do not outweigh the other evidence of record which shows that other manufacturers are using CHILDREN'S DHA to refer to the same genus of goods.<sup>41</sup>

We have considered applicant's additional arguments but find them all unpersuasive. Accordingly, we find that CHILDREN'S DHA is the generic name for nutritional supplements containing DHA inasmuch as this wording encompasses nutritional supplements containing DHA formulated for children. *Reed Elsevier*, 77 USPQ2d at 1654.

***Whether CHILDREN'S DHA is Merely Descriptive***

Implicit in our holding that the evidence before us establishes that CHILDREN'S DHA is generic for applicant's goods is a holding that it is at least merely descriptive of applicant's goods under Section 2(e)(1). "The generic name of a thing is in fact the ultimate in descriptiveness." *Marvin Ginn*, 228 USPQ at 530.

---

<sup>41</sup> The additional form declarations submitted on May 20, 2009 have the same failings. Many are missing critical information or unduly rely on applicant's claim of being first to market to suggest that the proposed mark is not generic.

***Acquired Distinctiveness***

For the sake of completeness, in the event the mark is found to be not generic, we now turn to the issue of whether applicant's mark has acquired distinctiveness. In finding that the designation CHILDREN'S DHA is incapable of being a source identifier for applicant's goods, we have considered all of the evidence touching on the public perception of this designation, including the evidence of acquired distinctiveness. Applicant has the burden to establish a prima facie case of acquired distinctiveness. *See Yamaha Int'l Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988).

The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. *See Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (CCPA 1970). Typically, more evidence is required where a mark is so highly descriptive that purchasers seeing the matter in relation to the named goods or services would be less likely to believe that it indicates source in any one party. *See, e.g., In re Bongrain Int'l Corp.*, 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990).

Finally, the ultimate test in determining whether a designation has acquired distinctiveness is applicant's success, rather than its efforts, in educating the public to associate the proposed mark with a single source. *In re Redken Labs., Inc.*, 170 USPQ 526, 529 (TTAB 1971) ("It is necessary to examine the advertising material to determine how the term is being used therein, what is the commercial impression created by such use, and what would it mean to purchasers.).

Applicant asserts that it "has had great commercial success with its CHILDREN'S DHA brand" and that it "has enjoyed a substantially exclusive use of the mark for more than 10 years."<sup>42</sup> Further, applicant alleges that it has invested "considerable resources" in promoting its CHILDREN'S DHA mark and "has succeeded in creating in the minds of consumers an association between the mark CHILDREN'S DHA and Applicant as the origin of the goods."<sup>43</sup>

We do not find applicant's evidence to be convincing. First, applicant's use since 2000, while indicative of a degree of commercial success, is not conclusive or persuasive considering the nature of the mark sought to be registered and the widespread third-party use of CHILDREN'S

---

<sup>42</sup> Applicant's Br. at 17.

<sup>43</sup> *Id.*

DHA to generally refer to supplements for children. See *In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984) (evidence submitted by applicant held insufficient to establish acquired distinctiveness of PACKAGING SPECIALISTS, INC., for contract packaging services, notwithstanding, *inter alia*, continuous and substantially exclusive use for sixteen years, deemed "a substantial period but not necessarily conclusive or persuasive").

Second, while applicant has also submitted sales information, purchase orders for product samples, advertising expenditures, and samples of advertising, this evidence does not conclusively establish that consumers understand CHILDREN'S DHA to refer solely to applicant's goods. For example, none of the purchase orders show how the mark is used on the packaging. There also is no context for the sales and advertising figures and marketing materials by which we may determine that the term CHILDREN'S DHA has come to indicate source in applicant during the time the mark has been in use.

Moreover, as discussed *supra*, much of applicant's evidence uses CHILDREN'S DHA with applicant's house mark, Nordic Naturals, which reduces the probative value of the evidence. The affidavits and declarations also discussed *supra*, also are of limited probative value in showing that

the consumer recognizes CHILDREN'S DHA in light of the use of CHILDREN'S DHA by others in the nutritional supplement field.

In sum, the evidence submitted by applicant suggests that it has enjoyed some commercial success in marketing its nutritional supplements under the name CHILDREN'S DHA. But success in creating and selling a particular product does not mean the name given to that product serves as a source identifier. When all of the evidence of record is viewed as a whole, including the widespread use of the mark by third parties and the media to refer to products made by others, applicant's evidence falls short of demonstrating that the mark has acquired distinctiveness under Section 2(f).

*Decision:* The refusal under Section 2(a) of the Trademark Act of 1946 on the ground that the proposed mark is deceptive is reversed. The requirement that the identification of goods be amended is affirmed. The refusal under Section 2(e)(1) of the Trademark Act on the ground that the mark is generic is affirmed. The refusal under Section 2(e)(1) of the Trademark Act on the ground that the mark is merely descriptive and that the Section 2(f) showing is insufficient is likewise affirmed.